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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 499

META BIDDLE ROBINETTE,
Petitioner,
against
GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

No. 500

ELISE BIDDLE PAUMGARTEN,
Petitioner,
against
GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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INDEX

Citations

Cases: PAGE

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Opinions Below

These cases were consolidated for hearing and opinion in the Board of Tax Appeals and the court below. The opinion of the Board of Tax Appeals (R. 15-19) is reported in 44 B. T. A. 701. The opinions of the Circuit Court of Appeals on the hearing (R. 37-42) and on the rehearing (R. 50-52) are reported in 129 F. (2d) 832.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on March 23, 1942 (R. 42-43). Petition for rehearing filed April 7, 1942 (R. 43) was granted April 21, 1942 (R. 48-49). On July 30, 1942, the Court affirmed its previous order reversing the decisions of the Board (R. 50-52). The petition for writs of certiorari was filed October 29, 1942 and was granted December 7, 1942 (R. 53). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

(a) Whether the remainder interest under an irrevocable *inter vivos* transfer in trust is taxable under Sections 501 *et seq.* of the Revenue Act of 1932, as amended, where the grantor provides that the income is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when they reach twenty-one, or, if none, then to the testamentary appointees of the survivor of the grantor and the two others with life interests.

(b) Whether the Commissioner in valuing a trust remainder for gift tax purposes must make due allowance for, and deduct the value of, a reversionary interest retained by the grantor.

Statutes and Regulations Involved

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 31-34.

Statement

The facts as stipulated by the parties (R. 7-14; 30-32) and found by the Board of Tax Appeals (R. 15-17) may be summarized as follows:

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta

Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before (R. 15-16).

Petitioner, Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, The Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death to her daughter monthly for life. Upon the termination of the life estates the trustees were to distribute the corpus to the issue of the daughter *per stirpes* upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons in such proportions and for such estates as the survivor of the three should by will appoint (R. 16).

At the same time, this petitioner executed a revocable trust indenture the provisions of which were the same as those of the irrevocable trust, and she transferred to the trustees certain securities (R. 16).

Petitioner, Elise Biddle Robinson, who was then thirty years of age and unmarried, executed an irrevocable trust indenture, the Girard Trust Company, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either to the survivor. Upon termination of the life estates the trustees were to distribute the corpus to her issue *per stirpes* upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions and for such estates as the survivor of the three should by will appoint. She married in April of 1936 and now has issue (R. 16).

At the same time, this petitioner executed an irrevocable trust indenture, The Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned except as to the amount and classification of the properties. To the trustees she transferred property having a market value of $216,709.16. At the same time, she executed a revocable trust indenture to the same trustees, with the same provisions as the irrevocable trust, and transferred certain securities to the trustees (R. 17).

The petitioners' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14, 1936, and claimed there was no gift tax liability (R. 17).

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40 and assessed a tax of $385.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52

and assessed a tax of $129.53 against her, which she paid about January 29, 1940 (R. 17).

Thereafter the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson (R. 17).

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by the Commissioner at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred (R. 17).

The Board of Tax Appeals reversed the determination of the Commissioner, holding that the transfers were not subject to the gift tax imposed by the Revenue Act of 1932, as amended (R. 17-19).

The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit, and on March 23, 1942, that Court entered its decision that the transfers of the remainder interests under the trusts constituted taxable gifts (R. 37-42). On April 21, 1942 (R. 48), the Circuit Court granted a petition for rehearing filed by the grantors, and thereafter on July 30, 1942, entered its decision (R. 50-52) reaffirming its opinion of March 23, 1942, and further holding that each of the grantors made such a gift as rendered the whole remainder taxable, and that the cases were not required to be remanded to the Board of Tax Appeals for evaluation of the grantors' reversionary interests.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding and deciding that the transfers in trust here in issue by the terms of which the respective grantors

provided that the income therefrom is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when they reach 21 or, if none, then to the testamentary appointees of the survivor of the grantor and the two others with life interests, are such transfers as are subject to the gift tax provisions of the Revenue Act of 1932 as amended; and in failing to hold and decide that the transfers in trust here in issue are not subject to tax under the gift tax provisions of the Revenue Act of 1932 as amended.

2. In holding and deciding that no allowance or deduction, for the value of a reversionary interest retained by the grantor, need be made in valuing a trust remainder for gift tax purposes.

3. In reversing the judgments of the Board of Tax Appeals.

Summary of Argument

1. The transfers of the remainder interests made by the petitioners under the irrevocable indentures of trust on January 14, 1936, did not constitute taxable gifts within the meaning of the Revenue Act of 1932, as amended, because:

A. The transfers were made and executed by the petitioners for a good and valuable consideration in money or money's worth.

B. There were no donees in existence on the date of the creation of the trusts to accept the purported gifts of the remainders thereof.

C. The reservation by the petitioners of a possible power of appointment negatives the relinquishment *in praesenti* of dominion and control of the remainders necessary to establish the purported gift *inter vivos*.

2. In any event in computing the value of the remainders herein, allowance should be made for the value of the Grantors' reversionary interests.

ARGUMENT

1. The transfers of the remainder interests, made by the petitioners under the irrevocable indentures of trust on January 14, 1936, did not constitute taxable gifts within the meaning of the Revenue Act of 1932, as amended.

A. The transfers were made and executed by the petitioners for an adequate and full consideration in money or money's worth.

This argument was presented before the Board but the Board disposed of it as follows (R. 19):

> "The petitioners argue also * * * that they may not be taxed as upon gifts because the creation of the trusts was a reciprocal arrangement each in consideration of the other. These questions do not require decision."

Upon the renewal of the above argument on the appeal the Court below held (R. 41) that the family agreement regarding testamentary dispositions does not meet the statutory requirement of consideration and that an exchange of such promises does not constitute the necessary "adequate and full consideration in money or money's worth" as used in the gift tax.

We respectfully submit that the decision of the Court below on this point is in error.

The Revenue Act of 1932 as amended does not provide us with a definition of the term "gift". However, an examination of the Senate Committee Report (accompanying the Revenue Act of 1932) discloses that the term "gift" was intended to be used in its broadest and most comprehensive sense. Webster's New International Dictionary, 2nd Edition, defines a gift as "anything voluntarily transferred by one person to another without compensation; a present." The term is defined in 28 *Corpus Juris* 620 as

"A voluntary transfer of property by one to another, without any consideration or compensation therefor."

Throughout the gift tax provisions of the Revenue Act of 1932 and the regulations promulgated thereunder reference is several times made to "an adequate and full consideration in money or money's worth" as being necessary to exempt a transfer from the levy of the gift tax. But what constitutes an adequate and full consideration in money or money's worth?

In reaching an answer to the problem all evidential factors, especially the effects of the family relationship, must be carefully examined.

> *Robinson* v. *Commissioner* (1932), 59 Fed. (2d) 1008.

The Board of Tax Appeals found that the transfers made by the Respondents under the irrevocable indentures of trust dated January 14, 1936, were made and executed as an integral part of a family plan to conserve the family fortunes for those entitled to receive them by relationship and descent (R. 15-16). The plan was thought by members of the family, who were extremely close and affectionate with one another, to be necessary because Miss Robinson was then contemplating marriage and it was feared that, after her marriage, a large part of the fortune then under her control might pass under the control of her husband and be forever lost to the family. Upon consulting counsel a plan was arranged to accomplish the object in view, which plan required the parties involved to execute the following steps (Orig. Trans. 34):

(1) Mr. Robinette, at that time being indebted to Miss Robinson for certain advances, agreed to execute a will directing that, after his death, the principal of his estate was to be paid over to Miss Robinson or her issue, subject to a life income therefrom to his wife, if she survived him. Miss Robinson, therefore, would not receive peyment of the amount due her until after the death of Mr. Robinette or his wife, whichever should survive;

(2) Mrs. Robinette was to execute an irrevocable trust to which would be transferred the greater part of the moneys under her control, in which she would reserve a life income and then provide that, on her death, the income was to be paid monthly to her husband and on his death the net income to be paid to Miss Robinson as long as she lived, and on the death of the survivor of Miss Robinson and Mr. Robinette the principal was to be paid to the issue of Miss Robinson, if any, and in default of issue of Miss Robinson, then to such persons, and in such proportions and for such estates as Mrs. Robinette, Mr. Robinette or Miss Robinson, whichever of the three should be the survivor, might by last will and testament direct, limit and appoint;

(3) Mrs. Robinette was also to execute a revocable trust to which would be transferred the remaining part of the moneys under her control and containing provisions similar to the irrevocable indenture, except that said trust was to be revocable at will;

(4) Miss Robinson was to execute an irrevocable trust, to which would be transferred the greater part of the moneys under her control, reserving the life estate for herself, and then provide that on her death the income was to be paid to her stepfather and her mother, or the survivor, with the remainder over to her own issue, if any, and, in default of issue, then to such persons and in such proportions and for such estates as Mrs. Robinette or Mr. Robinette or Miss Robinson, whichever of said three shall be the survivor, may by last will and testament direct, limit and appoint;

(5) Miss Robinson was also to execute a revocable trust to which would be transferred the balance of the moneys under her control, and containing provisions similar to the irrevocable indenture, except that said trust was to be revocable at will.

Each of the foregoing steps was duly executed by Mr. Robinette and the Petitioners, and, with the exception of Mr. Robinette's will, were all executed by the parties at the same time and same place. Mr. Robinette's will was executed approximately one week prior to January 14, 1936, the date on which the Petitioners executed both the irrevocable and the revocable trusts (R. 16).

Under such family plan as outlined above, each of the three persons involved received a material and definite advantage and benefit. Mr. Robinette, by postponing the payment of the debt he owed to his stepdaughter, Miss Robinson, until after the death of himself or his wife, whichever survived, was able to provide for his wife by making her the life tenant of his estate.

Mrs. Robinette not only became assured of the receipt of income from her husband's estate during her life, but also that she would receive the income under the trusts created by her daughter should her daughter predecease her. Moreover, she was assured that, should her daughter die leaving issue, such issue would inherit virtually all their mother's estate without claim on the part of any husband her daughter might then have.

Miss Robinson became assured that ultimately her issue, should she die leaving any, would inherit the estates of her stepfather and of her mother, in addition to her own, and that she herself, if she should survive her mother and stepfather, would during her lifetime receive all the income from their respective estates.

In short, the family plan so adopted and carried out fully effected its intended purpose, namely, to keep the family fortunes in the family and thereby provide benefits to each of the three persons constituting the family to a greater or lesser extent, depending on the length of their lives and the order of their survivorship, and to do so principally through the creation of irrevocable trusts which could not be cancelled or modified in any manner. By this general agreement each one of these persons gave up, without regard to the future, the right to dispose of the greater part of their respective estates, within their own discre-

tion and as they might see fit. *Therefore the consideration between the Petitioners for the execution of the irrevocable trusts here involved was an agreement that each would transfer in trust subject to similar provisions the greater part of the moneys under her control.*

The valuation of the assets transferred by each of the Petitioners under the respective trusts has been stipulated by the parties and found by the Board (R. 7; 31; 16-17).

It is not to be argued that individuals give up a cherished right—that of free alienation of their property—unless an offsetting consideration passes to them. Such was the case here. The execution of the irrevocable trusts under consideration was not done in any donative spirit of free giving, but was done as the result of an actual bargain made for an adequate and valuable consideration in money or money's worth.

It must at least be conceded that, to establish a gift *inter vivos* there must be a clear and unmistakable intention on the part of the donor to give. *Edson* v. *Lucas*, 40 F. (2d) 398, 404 (1930).

The family plan adopted and carried out in this case by which each member of this family gave up, without regard to the future, the right to dispose of the greater part of their respective estates, within their own discretion as they might see fit, certainly constituted a transfer of property in the ordinary course of business, and a transaction which was bona fide at arm's length and free from any donative intent.

If this be so the Respondent is precluded from questioning the adequacy of the consideration for the transfers here involved since he has, in defining "an adequate and full consideration", promulgated Article 8 of Regulations 79 (*infra*, p. 33), which reads in part as follows:

> "* * * However, a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is bona fide at arm's length and free from any donative intent) will be considered as made for an adequate and full consideration in money or money's worth."

We therefore respectfully submit that the benefit gained by Mrs. Robinette under the trusts executed by Miss Robinson, and by Miss Robinson under the trusts executed by Mrs. Robinette, and by Mr. Robinette under the novation worked out with Miss Robinson for the delay in payment of his account constituted an adequate and valuable consideration in money or money's worth within the terms of Section 503 of the Revenue Act of 1932 as amended (*infra*, p. 31) and Article 8 of Regulations 79 promulgated under that Act for the execution of the respective trust agreements, and as such exempts said transfers from the levy of a gift tax.

B. **There were no donees in existence on the date of the creation of the trusts to accept the purported gifts of the remainders thereof.**

Each of the irrevocable trust indentures created by the petitioners directed the Trustees on the termination of the life estates to pay over and distribute the corpus or principal of the respective trusts to the issue of Miss Robinson, to be divided among such issue *per stirpes* upon the attainment by such issue respectively of the full age of twenty-one years. The facts as stipulated and as found by the Board (R. 30, 16) show that on January 14, 1936, the date of the creation and execution of the trusts by the petitioners, Miss Robinson was not married and was without issue. The trust instruments further provided that in default of issue of Miss Robinson the principal was to pass under the power of appointment to be exercised in the will of the survivor of the grantor and the two others with life interests.

The critical date for determination of whether or not a gift was effected is the date of the purported gift and the facts in existence at that time control the issue, not subsequent events. Therefore, the fact that Miss Robinson was or was not subsequently married and subsequently had or did not have issue is immaterial to the solution of the problem.

Ithaca Trust Co. v. *U. S.* (1929), 279 U. S. 151.

The gift tax statute does not attempt to tax as a gift every transfer in trust. The test of taxability is whether the transfer has the quality of a gift rather than whether it effects a valid trust. This Court stated in *Burnet* v. *Guggenheim* (1933), 288 U. S. 280, at 286,

> "The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift * * *."

The elements of a completed gift *inter vivos* have been determined in numerous decisions. *Edson* v. *Lucas* (1930), 40 F. (2d) 398, 404, is a leading Circuit Court case which reviews the authorities. The decisions are not in complete harmony as to all the necessary requirements of a completed gift, but agree that among the essential elements are the following:

> (1) There must be a donee capable of taking the gift;
>
> (2) There must be an irrevocable relinquishment to the donee of dominion and control of the subject matter of the gift; and
>
> (3) The transfer to the donee must be absolute and *in praesenti.*

In *Edson* v. *Lucas*, *supra,* the court said with respect to the concept of a completed gift (p. 404):

> "A statement frequently found in the decisions is: 'To constitute a valid gift *inter vivos*, there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately and fully executed by a delivery of the property by the donor, and an acceptance thereof by the donee.' "

This court held that a donee is essential to effect a completed gift in *Porter* v. *Commissioner* (1933), 288 U. S. 436, wherein it was said:

"A gift is a bilateral transaction and requires a donee as well as a donor; it is incomplete though the donor has parted with his interest if the donee remains indeterminate and the beneficiaries are determined only when the power to change them ends."

The decisions of the Pennsylvania courts, under whose jurisdiction the trusts involved herein are executed, are consonant with the above-cited authorities.

Sullivan v. *Hess*, 241 Pa. 407, 88 Atl. 544;
Packer v. *Clemson*, 112 Atl. 107;
In re Kaufman's Estate, 127 Atl. 133;
In re Scanlon's Estate, 169 Atl. 106.

Furthermore, the receipt of the trust assets by the trustees did not constitute the trustees donees within the meaning of the Gift Tax Law. This Court so held in *Helvering* v. *Hutchings* (1941), 312 U. S. 393.

Likewise it cannot be successfully argued that Miss Robinson could accept the gift for her children to be born. As was stated in 28 *Corpus Juris* 627, paragraph 18:

"There must be some person in being to accept a gift. An unmarried man cannot accept a gift for his future wife and children to be born."

Despite the well-defined concept of the essential elements of a gift established by the foregoing decisions, the Circuit Court below stated in its opinion herein of March 23, 1942, as follows:

"We are not disturbed by the fact that no donees of the reversionary interest were in existence at the date of the creation of the trust. The tax is primarily payable by the donor on his transfers by gift and not by the donees on their receipts. Since the donors have irrevocably parted with the property, the tax should attach even though the donees are not wholly ascertainable. In the words of our previously quoted Mr. Warren: 'The taxable event is, therefore, the irrevocable divestment of all the donor's rights in the prop-

erty, rather than the irrevocable vesting of rights in particular beneficiaries.' Warren, Correlation of Gift and Estate Taxes, 55 Harvard Law Review 1, 15."

The holding by the court below implies that the transfer from the donor and the transfer to the donee are not necessarily contemporaneous and that the foregoing elements of an *inter vivos* gift are not essential where a trust is employed as the medium for effecting a transfer by gift.

We invite this Court's attention to the fact that the court below in an earlier case held to the contrary. See *McBrier* v. *Commissioner* (1939), 108 F. (2d) 967, wherein the court below stated:

> "Furthermore, it has been recognized that where a settlor has irrevocably transferred property to a trust reserving only the power of changing the beneficiary to persons other than himself, there is no taxable gift since the *cestuis que trust* are not finally determined and *a gift requires a definite donee.*"

We do not agree with the opinion of the court below in the instant cases as above quoted. It fails to recognize that the so-called "legal interest" or "property" which is the subject of the gift consists, upon analysis, of a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously. Where a trust is used as the medium for effecting a gift, the grantor may by separate acts part with portions of his interest or property, the subject of the transfer. He may first transfer the bare "legal title" to the trustee, reserving the income and the powers to alter, amend or revoke. From time to time thereafter he may terminate his power to revoke or he may modify his power to alter or his power to amend, or he may surrender his reservation of the income. By each act the grantor accomplishes the transfer of portions of his "legal interest" or "property". However, these acts do not re-

sult in a taxable gift until the grantor has parted with enough of his interest or property rights to fulfill the essential elements of a gift. The court below, therefore, has erred in assuming that the initial transfer of rights, privileges, powers and immunities by a settlor results in a taxable gift even though the donees are neither in existence nor ascertainable.

It is entirely possible that the eventual recipients of the remainders herein may be charitable institutions. If such is the case, a gift tax certainly could not attach to the transfers.

In further dispute of the correctness of the opinion of the court below that the completion of the transfer from the donor rather than the completion of the gift to particular donees is the decisive factor, we respectfully point out that Section 501 of the Revenue Act of 1932, as amended (*infra*, p. 31), which imposes the gift tax, refers neither to "donors" nor to "donees" but lays the tax upon "the transfer * * * by gift."

Other sections of the statute show that Congress contemplated that the "transfer * * * by gift" is a single transaction to which both the donor and the donee are parties. Section 504(b) (*infra*, p. 31) provides that in the case of gifts other than of future interests made "to any person by the donor" during the calendar year, the first $5,000 of such gifts "to such person" shall be excluded. While Section 509(a) (*infra*, p. 31) provides that the tax shall be paid by the donor, Section 510 (*infra*, p. 32) provides that if the tax is not paid when due, the donee shall be personally liable to the extent of the value of the gift.

In further argument against the conclusion that a gift took place upon the execution of the trust indentures by the Petitioners on January 14, 1936, we would propose the following query: Against whom could the provisions of Section 510 of the Revenue Act of 1932, as amended (*infra*, p. 32), which provides that the donee of any gift is made personally liable for any gift tax to the extent of the value of the gift if the tax is not paid by the donor, be invoked? The obvious answer is that Section 510 of the Revenue

Act would be ineffectual in aiding collection of the tax, since no donee was in existence from whom it could have been collected. This Court has stated that Section 510 indicates well that there must be a donee possessing something to tax.

In *Estate of Sanford* v. *Commissioner* (1939), 308 U. S. 39, 46, this Court stated:

> "There are other persuasive reasons why the taxpayer's contention cannot be sustained. By §§ 315(b), 324, and more specifically by § 510 of the 1932 Act, 26 USCA, § 559, the donee of any gift is made personally liable for the tax to the extent of the value of the gift if the tax is not paid by the donor. It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he had paid the tax. Further, § 321(b)(1) exempts from the tax, gifts to religious, charitable, and educational corporations and the like. A gift would seem not to be complete, for purposes of the tax, where the donor has reserved the power to determine whether the donees ultimately entitled to receive and enjoy the property are of such a class as to exempt the gift from taxation. Apart from other considerations we should hesitate to accept as correct a construction under which it could plausibly be maintained that a gift in trust for the benefit of charitable corporations is then complete so that the taxing statute becomes operative and the gift escapes the tax even though the donor should later change the beneficiaries to the non-exempt class through exercise of a power to modify the trust in any way not beneficial to himself."

Anticipating the objection that a gift of the remainders under these trusts to the issue of Miss Robinson must be sustained since a contrary holding will violate the provisions of Regulations 79, Article 3 (*infra*, pp. 32-33), which provides in part that

> "* * * the tax is a primary and personal liability of the donor, is an excise upon his act of making

the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable'',

it is only necessary to refer to the well-recognized rule of law that a regulation, in order to be valid, must not only be consistent with the statute, but it must be reasonable.

Manhattan General Equipment Co. v. *Commissioner* (1936), 297 U. S. 129;

Lynch v. *Tilden Co.* (1924), 265 U. S. 315, 320-322;

Miller v. *United States* (1935), 294 U. S. 435, 439-440;

International Railway Co. v. *Davidson* (1922), 257 U. S. 506, 514.

The provisions of the gift tax statute are unambiguous and its directions are specific. Therefore, if Article 3, Regulations 79, is so construed as to subject to gift tax a transfer to donees not then in existence, as is involved in the instant cases, then the regulation is both inconsistent with the statute and unreasonable, and constitutes an amendment of the gift tax statute which renders the regulation a mere nullity.

Lynch v. *Tilden Produce Co., supra;*

Koshland v. *Helvering* (1936), 298 U. S. 441;

Estate of Sanford v. *Commissioner, supra.*

We therefore respectfully submit that, there being no issue of Miss Robinson in existence on the date of the creation of the trusts, gifts of the remainders under said trusts could not have been effected as to such issues, and such remainders must be construed, as of that date, as being retained by each of the grantors subject to the power of testamentary appointment. There was no transfer *in praesenti* of any absolute interest in the remainders and accordingly the transfers of the remainders in trust did not effect a taxable gift.

C. The reservation by the petitioners of a possible power of appointment negatives the relinquishment in praesenti of dominion and control of the corpus or principal necessary to establish the purported gifts inter vivos.

Each of the irrevocable trust indentures created by the petitioners directed the Trustees on the termination of the life estates to pay over and distribute the corpus or principal of the respective trusts to the issue of Miss Robinson, to be divided among such issue *per stirpes* upon the attainment by such issue of the full age of twenty-one years, and in the event of a default of issue of Miss Robinson, to such persons, in such proportions and for such estates as Mrs. Robinette or Mr. Robinette or Miss Robinson, whichever of said three shall be the survivor, may by last will and testament, duly proved and allowed, direct, limit and appoint (R. 10, 16-17).

The remainder interests after the death of the life beneficiaries in each trust will either go to the issue of Miss Robinson or will pass under the will of the survivor of Mrs. Robinette, Mr. Robinette or Miss Robinson. On the date of the execution of the trusts, Mrs. Robinette was fifty-five years of age, Mr. Robinette was over fifty-five years of age and Miss Robinson was thirty years of age (R. 16). It would appear that, on a basis of the American Tables of Mortality, the probability is that Miss Robinson would survive her father and mother. The question here, however, is not one of the probabilities as to which way the remainder would go, but it is whether the petitioners made any gift in 1936 of the remainder interests under the trusts. See *Ithaca Trust Co.* v. *U. S.* (*supra*).

The trust instruments clearly evidence the fact that the remainder interests in the issue of Miss Robinson are wholly contingent upon (1) their birth and (2) their attainment of the full age of twenty-one years. Assuming that issue are born to Miss Robinson, then upon such issue attaining twenty-one years of age it will at that time be possible to ascertain the particular remaindermen who will take. If the issue do not reach the age of twenty-one

years, they will get nothing. Thus the transfers to the issue are to take effect in possession or enjoyment if at all only upon the attainment by such issue of the age of twenty-one years.

If the issue of Miss Robinson do not attain the age of twenty-one years, then the remainders are to pass under the will of the survivor of the three members of the family. If Miss Robinson is the survivor of the three, then all of the trust remainders, including those established by her, will pass under her will. It is also entirely possible that the trust remainders will pass under the will of Mrs. Robinette, including that established by her, if she should be the survivor.

In its decision herein the Board of Tax Appeals held (R. 18):

> "The remainder was to go to Elise's children upon their attaining the age of twenty-one, respectively; and, if no children, then to the appointee by will of the survivor of the three, the daughter, her mother, and her stepfather. Thus, as to each grantor, there was a possible power of testamentary disposition of the remainder—a power as substantial as a reversion would be. If, for example, Elise, being thirty and unmarried when her trust was created, should fail to have children and should survive her mother and stepfather, both of whom were substantially older, she would have a power of testamentary appointment. Because of this retained interest, whether vested or contingent, the trust property would be included in her gross estate subject to estate tax. She had not so completely disposed of the property by means of the trust as to avoid the estate tax. *Helvering* v. *Hallock*, 309 U. S. 106. Until children were born, as they were, the settlor still had a possible power of disposition of the remainder, which is one of the most important attributes of ownership. Upon her death, if there were no issue, her testamentary power of appointment would be exercised if she were the last survivor, or that power would be freed in the hands of her surviving mother or stepfather. So, when she created the trust she retained an interest in the property sufficient to warrant

the expectation that it would be included in her gross estate upon her death."

But the Circuit Court below rejected the decision of the Board on this point in the following language (R. 39-40):

"'Are *inter vivos* transfers in which the settlor has reserved to himself some reversionary interest subject to a gift tax as well? If the gift tax is merely supplementary to the estate tax, it is quite arguable that no gift tax can be imposed. These cases seem to be distinguishable, however, from the situation of the *Sanford* case, for reasons already outlined. A valuable irrevocable interest in another has been created by the settlor. There is no power in him to get it back; so long as the beneficiaries live, they will enjoy the income of the property, free from his control. Hence it seems that, to the extent of the value of the interests created in donee-beneficiaries, there is a taxable gift.' Magill, The Federal Gift Tax, 40 Columbia Law Review 773, 783, 787.

"We confess that we agree with these answers and further believe that the case at bar is embraced therein. The respondent settlors retained no economic control over the trusts except for the possibility that during the settlors' lifetime the life tenants die with the younger respondent remaining childless. Thus, the settlors could not themselves bring about the exercise of their powers of appointment without committing a crime. This view is supported by the recent opinion by Judge Frank in Commissioner *v.* Marshall and is the one taken by a tax expert writing in the Harvard Law Review:

"'It thus appears that such a reversionary interest in the grantor would not prevent the imposition of a gift tax. Certainly the transfer to a trustee of property over which the grantor only reserves a possibility of reverter (irrespective of its proximity or remoteness) constitutes such a transfer of property as is covered by the gift tax. If the gift tax is merely supplementary to the estate tax, of course no gift tax can be levied, but these trusts are distinguishable from

the trusts in the *Sanford* case because here the grantor reserved no economic control.' Warren, Correlation of Gift and Estate Taxes, 55 Harvard Law Review 1, 25."

The attention of this Court is respectfully directed to the use of the words "economic control" by the Circuit Court in the above quotation from its decision.

The Board has found herein (R. 16-18) that the respective grantors in each trust reserved life estates and testamentary powers of appointment over the remainders. Such reserved interests, we submit, constitute economic control within the meaning of the Gift Tax Law and the Estate Tax Law. 26 U. S. C. A. 811; *Helvering v. Hallock*, (1940) 309 U. S. 106; *Helvering v. Bullard*, (1938) 303 U. S. 297; *Helvering v. Mercantile Commerce B. & T. Co.*, (1940) 111 F. (2d) 224, cert. den. 310 U. S. 654.

In *Helvering v. Hallock (supra)*, this Court held that a possibility of reverter was an interest sufficient to render the trust assets subject to an estate tax in the estate of the deceased grantor. The Board of Tax Appeals adopted the same view in its opinion herein (R. 18) when it said: "Because of this retained interest, whether vested or contingent, the trust property would be included in her gross estate subject to estate tax. She had not so completely disposed of the property by means of the trust as to avoid the estate tax."

The same thought was expressed by this Court in *Rasquin v. Humphreys* (1939) 308 U. S. 54 and in *Sanford's Estate v. Commissioner of Internal Revenue, supra.* In the *Sanford* case this Court stated (p. 44):

> "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that

it becomes subject to the estate tax upon its extinguishment at death."

Even Mr. Warren, cited by the Court below in its opinion of March 23, 1942, in his article on Correlation of Gift and Estate Taxes, 55 Harvard Law Review, recognizes the existence of a substantial economic control in these grantors and states the following on page 32 of that article:

> "E. *Trust with Reserved Life Estate and Testamentary Power of Appointment over Remainder.*—Similar to the *Sanford* case is the group of cases in which a grantor has created an irrevocable trust, reserving only the right to appoint the remainder after his life estate by will, and designating beneficiaries in default of appointment. In *Commissioner* v. *Chase National Bank*, the decedent created such an irrevocable trust from which she was to receive the income during her life, and thereafter the corpus was to be paid to her lawful descendants in such proportions as she should in her last will appoint, and in default of appointment, to named beneficiaries. Such a reserved power clearly constitutes economic control and causes the corpus of the trust to be included in the gross estate. It seems clear that until it is released, no transfer of property has been completed for gift tax purposes. This result is completely in accord with the principle of correlating the income, gift, and estate taxes, and the *Sanford* case presents no obstacle."

Since the decisions by this Court in the *Sanford* case (*supra*) and in the *Burnet* v. *Guggenheim* case (*supra*) it has been the generally accepted view that the Gift Tax is supplementary to the Estate Tax and that consequently a transfer is not to be taxed as a gift, if a grantor retains an interest in trust property, whether vested or contingent, sufficient to require the inclusion of the same in the grantor's gross estate subject to estate tax. In holding that the remainders herein are subject to gift tax the Court below has apparently rejected the heretofore accepted principles that the gift tax statute does not contemplate two taxes; and that a gift tax should not be imposed where it is evident

that the transferred property will be subjected to an estate tax.

These principles were forcefully expressed by this Court in the *Sanford* case (*supra*) at page 42 as follows:

> "The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together. Burnet *v.* Guggenheim, supra (288 U. S. 286, 77 L. ed. 751, 53 Ct. 369). An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death."

And in the same case at pages 45-47, this Court stated:

> "We think, as was pointed out in the Guggenheim Case, supra, (288 U. S. 285, 77 L. ed. 751, 53 S. Ct. 369), that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete."

In the light of the above cases we consider it appropriate to accentuate the fact that the reservation by a grantor of a life estate or a power of appointment such as is involved in the instant cases has been declared the occasion for the imposition of an estate tax upon the corpus of the trust (cf. 26 U. S. C. A., Sec. 811; *Helvering* v. *Bullard* (*supra*); *Helvering* v. *Mercantile-Commerce Bank & Trust Co.* (*supra*); *Helvering* v. *Hallock* (*supra*).

The natural implication to be derived from the decision of the court below in the instant cases and from the recent decisions of the First, Second and Fifth Circuit Courts in *Higgins* v. *Commissioner* (1942), 129 F. (2d) 237; *Commissioner* v. *Marshall* (1942), 125 F. (2d) 943, and *Commissioner* v. *McLean* (1942), 127 F. (2d) 942, respectively, is that the decision of this Court in the *Sanford* case should be confined to cases where the grantor has reserved the

power to "revoke" or "amend", and should be interpreted as only applicable to cases where the grantor's retained interest permitted him to "alter the flow of benefits."

In answer to such argument this Court stated in the *Sanford* case, *supra*, at page 47:

> "The argument of petitioner that the construction which the Government supports here, but assails in the Humphreys Case, affords a ready means of evasion of the gift tax is not impressive. It is true, of course, that under it gift taxes will not be imposed on transactions which fall short of being completed gifts. But if for that reason they are not taxed as gifts they remain subject to death taxes assessed at higher rates, and the Government gets its due, which was precisely the end sought by the enactment of the gift tax."

Under the correlation theory as expressed in the judicial decisions, the essential taxing element seized upon by the Treasury Department is the "string" retained by the grantor. The "string" may be of the hawser type; *i. e.*, a power to revoke or it may be of the thread size; *i. e.*, possibility of reverter; reserved control of investments, etc.

Under the income tax law, the income of an irrevocable trust payable to or for the use of named beneficiaries has been taxed to the grantor because of a "string" consisting of the grantor's reserved power to manage and direct investments of the trust. *Percy M. Chandler* v. *Commissioner* (1941), 119 F. (2d) 623. Under the estate tax law a remainder interest transferred under an irrevocable trust has been rendered taxable in the grantor's gross estate because of a "string" called "possibility of reverter," irrespective of its proximity or remoteness. *Helvering* v. *Hallock* (*supra*).

If, as its legislative history indicates, and if, as this Court decided in the *Sanford* case, the gift tax was designed as a complement and compensating tax to the estate tax, the transfers of the remainders here involved clearly cannot be subject to a gift tax since the "string" or interest retained by the grantors herein, irrespective of its proxim-

ity or remoteness has been declared the occasion for the imposition of an estate tax upon the corpus of the trust. (Cf. 26 U. S. C. A. Section 811; *Helvering v. Hallock, supra.*)

2. In any event, in computing the value of the remainders herein, allowance should be made for the value of the grantors' reversionary interests.

The failure of the court below to allow the grantors herein the right to deduct the value of their retained reversionary interests in computing the value of the remainders appears to be contrary to the provisions of the gift tax law, the Regulations and the judicial decisions which specifically exempt such interests from gift tax. This controversy is within narrow limits and presented only one issue to the Board and to the Circuit Court, *i. e.*, "whether the *remainder interests* under irrevocable *inter vivos* transfers in trust are taxable under Sections 501 *et seq.* of the Revenue Act of 1932, as amended * * *."

The Circuit Court below in its opinion of March 23, 1942 (R. 37-42) discusses and concedes the existence of reversionary interests in each of the grantors but concludes that such reversionary interests should not prevent the imposition of a gift tax. The court below, however, omitted to specify that the gift tax should attach only to the remainders after due allowance for the reversions.

On publication of the opinion of March 23rd, the grantors petitioned the court below for a rehearing, which petition was granted, and a reargument was had. The grantors pointed out to the court below on the reargument the evident error in its opinion of March 23rd. Subsequently that court in its opinion of July 30, 1942 (R. 50-51) stated as follows:

> "The taxpayers contend that at the least they are entitled to have the cases remanded to the Board to compute the value of the reversionary interest remaining in the grantor of each trust. This they contend must be deducted in order to furnish the proper determination of the value of the remainders. The Com-

missioner, on the other hand, contends that whatever either taxpayer has left by way of reversion is too contingent and remote to be valued. It is to be borne in mind that the question here is the valuation of the remainders created in each of these two deeds of trust. * * * The reversionary interests cannot in any way defer the time when the gifts will vest; nor can they defeat the latter. We think, therefore, that each of the respective settlors made such a gift as makes the whole taxable, subject, of course, to the reserved life estate. The cases do not need to be sent back for an evaluation of the reversionary interests."

The identical problem, concerning a valuation of the grantors' reversionary interests, confronted the Fifth Circuit Court of Appeals in the case of *Commissioner* v. *Marrs McLean* (1942), 127 F. (2d) 942. That case involved the execution of reciprocal trusts by husband and wife creating a life estate in a person other than the grantor and directed that the principal be distributed upon the death of the life tenant to the grantor's daughter; in the event the daughter predeceased the life tenant without issue, the principal was to be paid to the life tenant; if, however, the daughter predeceased the life tenant leaving issue, then the principal was to be paid to such issue upon the death of the life tenant. It was further provided that if none of such issue survived the life tenant or if the daughter, predeceased by the life tenant left no issue, then the trust was to revert to the grantor if he or she be living unless the daughter should leave a Will disposing of the trust estate, in which event the trust was to go as her Will directed.

Hutcheson, *J.*, writing for that court, answered the same contention as made by the respondents in the instant cases as follows, at page 944:

"Upon the question of its value the Commissioner contends that the entire value of the property dealt with in the transfers is includable as taxable gifts for 1934, either because the possibility of reverter was too remote to justify placing any value on it or, as was the case in Hughes *v.* Commissioner, 9 Cir., 104 F. 2d 144, because its value was not shown.

With the first contention that the possibility of reverter was too remote to be valued we cannot agree, and there is even less merit in the second contention, that because it was not valued in the proofs, the Commissioner's valuation of the whole property must prevail in the face of our finding that the gift was not of the whole of it.

The Board stating 'perhaps the transfers effected completed gifts of some estates less than a fee,' correctly stated 'the (Commissioner's) determination was not made on that basis, the values necessary to any such determination are not in the record and no such issue is suggested by the parties.' The Commissioner, having valued the property on a different theory, may not ask that the value he gave to it without regard to the reservation, be taken as its value, giving due regard thereto.

The judgment of the Board while affirmed as to the 1933 taxes will be reversed as to those for 1934 and the cause as to those taxes will be remanded to it with instructions to value the estates transferred by the 1934 gift in trust, and redetermine the deficiencies accordingly."

The *Hughes* v. *Commissioner* case referred to in the above-quoted opinion of the Fifth Circuit, also found that such valuations should have been deducted in computing the value of the remainders. In that case, the court, in considering the taxpayer's contention that, since Section 506 of the Revenue Act of 1932 provides that if "the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift," only the value of the interest in the property transferred should be included in the return and the value of the interest in the property transferred, which he retained, should be excluded from the amount of the gift, stated as follows, at page 148:

"Such value should have been deducted from the value of the securities transferred, but there was no evidence of such value submitted to the Board."

There is no question in the instant case as to evidence of the value of the reversionary interests. The court below in its opinion of July 30th (R. 51) stated:

> "According to the Regulations it is made on the basis of the 'present value of $1 due at the end of the year of death of a person of specified age'. Such an evaluation is a matter of calculation from the facts and figures already in the record in these cases."

Thus in the instant cases the court below held the entire corpus of the trusts, after deduction of the primary life estates, subject to gift tax without excluding the value of the grantors' reversionary interests whereas the gift tax law, the Regulations promulgated thereunder (Regulations 79, Art. 19(7), *infra*, p. 34) and the judicial decisions above quoted direct the exclusion of the value of the reversionary interests in computing the value of the remainders as such for gift tax purposes.

We, therefore, respectfully submit that, if this Court is of the opinion that the remainder interests transferred under the instant trusts constituted taxable gifts within the meaning of the pertinent provisions of the Revenue Act of 1932, as amended, then in rendering its decision this Court should direct that the cases be returned to the Board of Tax Appeals (now the Tax Court of the United States) with instructions to the Board to value the reversionary interests retained by the grantors herein, and to redetermine the deficiencies accordingly.

Conclusion

The decision of the Circuit Court of Appeals for the Third Circuit should be reversed.

Dated, New York City, December 24, 1942.

Respectfully submitted,

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[illegible]

Appendix

Revenue Act of 1932, C. 209, 47 Stat. 169

Section 501:

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act."

Section 503:

"Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

Section 504(b):

"*Gifts less than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year."

Sec. 509(a):

"*Time of payment.*—The tax imposed by this title shall be paid by the donor on or before the 15th day of March following the close of the calendar year."

SECTION 510:

"The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien herein imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth. If the Commissioner is satisfied that the tax liability has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all of the property from the lien herein imposed."

TREASURY REGULATIONS 79 (1936 ED.) PROMULGATED UNDER THE REVENUE ACT OF 1932, AS AMENDED BY THE REVENUE ACTS OF 1934 AND 1935:

ART. 3:

"*Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

"As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal

and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. A donor shall be considered as having the power to revest in himself the beneficial title to the property transferred if he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. The relinquishment or termination of the power, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the formal transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the donor's power to receive it himself, and constitutes a gift of such income or of such other enjoyment taxable in the calendar year of its receipt.

"If the donor contends that a power retained by him constitutes beneficial dominion and control, and that by reason thereof the transfer is not in substance a gift, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument by which the transfer was made, should be submitted."

ART. 8:

"*Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of

property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift."

Art. 19(7):

"* * *

"If the gift is of a remainder or reversionary interest subject to an outstanding life estate, the value of the gift will be obtained by multiplying the value of the property at the date of the gift by the figure in column 2 of Table A opposite the number of years nearest to the age of the life tenant. In case the remainder or reversion is subject to an estate for a term of years, Table B should be used."